AIC DotCom Sdn Bhd (suing in capacity of representative for MTEX Corp Sdn Bhd) v MTEX Corp Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03–95 OF 2003
GOPAL SRI RAM, ABDULL HAMID EMBONG AND HASAN LAH JJCA
19 JANUARY 2009

Civil Procedure — Striking out — Action — Whether reasonable cause of action shown — Derivative action — Facts as pleaded did not support a derivative action — Whether plain and obvious case to be struck out — Rules of the High Court 1980 O 18 r 19(1)

Civil Procedure — Striking out — Power to amend — Whether judge ought to have exercised power of amendment under O 18 r 19(1) of the Rules of the High Court 1980 — Whether pleading could be saved by amendment

Companies and Corporations — Derivative action — Fraud on the minority — Whether pleaded facts adequate to bring action within exception to rule in Foss v Harbottle

This was an appeal against the order of High Court allowing the respondents'/defendants' application to strike out the appellant's/plaintiff's pleading as wanting a cause of action under O 18 r 19 of the Rules of the High Court 1980. The appellant contended that its statement of claim pleaded a derivative action within the exception recognised by the rule in *Foss v Harbottle* (1843) 2 Hare 461. According to the appellant, even if the pleading was defective the learned judge ought to have exercised his power of amendment under O 18 r 19(1).

Held, dismissing the appeal with costs:

(1) The appellant's pleaded case was not a derivative action. The facts relied upon by the appellant did not assert that the purported wrongdoers were in control of the subject company and for that reason the action could not be brought by the company. The gist of the appellant's complaint was that a former director of the company allegedly committed certain breaches of her fiduciary duties for which she must now be held to account. This was not sufficient to be made the subject matter of a derivate claim (see paras 4–5).

(2) A court which is moved to strike out a pleading has a separate and independent jurisdiction to direct an amendment to save the pleading in lieu of it being struck out. But the power may only be exercised if the pleading is capable of being saved by an amendment. No amendment could possibly save the appellant's pleading because this was not a case in which the appellant could contend that the alleged wrongdoers were in control of the subject company (see para 6).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap perintah Mahkamah Tinggi yang membenarkan permohonan responden-responden/defendan-defendan untuk membatalkan pliding perayu-perayu/plaintif-plaintif oleh kerana ketiadaan kausa tindakan di bawah A 18 k 9 Kaedah-Kaedah Mahkamah Tinggi 1980. Perayu berhujah bahawa pernyataan tuntutannya memplid tindakan terbitan di dalam pengecualian yang diperakui oleh peraturan di dalam *Foss v Harbottle* (1843) 2 Hare 461. Menurut perayu, meskipun pliding tersebut adalah cacat, hakim yang bijaksana seharusnya melaksanakan kuasa pindaan beliau di bawah A 18 k 19(1).

Diputuskan, menolak rayuan dengan kos:

(1) Kes yang diplid oleh perayu bukanlah tindakan terbitan. Fakta-fakta yang diguna pakai oleh perayu tidak menunjukkan bahawa syarikat tersebut adalah dalam kawalan pesalah-pesalah dan disebabkan itu tindakan tersebut tidak boleh dibawa oleh syarikat tersebut. Inti pati aduan perayu adalah bahawa pengarah syarikat terdahulu telah melakukan beberapa pelanggaran kewajipan fidusiarinya yang mana dia seharusnya kini bertanggungjawab. Ini adalah tidak mencukupi untuk dijadikan sebagai perkara subjek bagi tuntutan terbitan (lihat perenggan 4–5).

(2) Mahkamah yang dipohon untuk membatalkan pliding mempunyai bidang kuasa berasingan dan bebas untuk memerintah suatu pindaan menyelamatkan pliding tersebut sebagai ganti pembatalan. Tetapi kuasa tersebut hanya boleh dilaksanakan sekiranya pliding tersebut dapat diselamatkan oleh suatu pindaan. Tiada pindaan yang dapat menyelamatkan pliding perayu oleh kerana ini bukanlah kes di mana perayu dapat menghujahkan bahawa syarikat tersebut adalah dalam kawalan pesalah-pesalah (lihat perenggan 6).]

Notes

For cases on fraud on the minority, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 129–135.

For cases on striking out action, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7428–7473.

For cases on striking out generally, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7425–7635.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417, CA (refd)

Foss v Harbottle (1843) 2 Hare 461 (refd)

Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd [1995] 1 MLJ 504, HC (refd)

Shahidan Shafie v Atlan Holdings Bhd & Anor & other appeals [2005] MLJU 279; [2005] 3 CLJ 793, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, 19(1)

Appeal from: Civil Suit No D1–24–41 of 2002 (High Court, Kuala Lumpur)

Gideon Tan (Adrian Cumming with him) (Gideon Tan Razali Zaini) for the appellant.

Teh Meng Teck (Bong Lep Siong with him) (Cheah Teh & Su) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This appeal is directed against the order of High Court granting the respondents' (defendants in the court below) application to strike out the appellant's pleading as wanting a cause of action within the framework of the RHC O 18 r 19.

[3] The appellant's main arguments before us are two-fold. Firstly, it has been submitted this morning that the action pleaded in the appellant's statement of claim is a derivative action brought within the exception recognised by the rule in *Foss v Harbottle* (1843) 2 Hare 461. The second limb of the appellant's case rests on the submission that even if the written pleading is defective the learned judge ought to have exercised his power of amendment granted to him by the terms of O 18 r 19(1). See *Kuala Lumpur Finance Bhd v KGV & Associates Sdn Bhd* [1995] 1 MLJ 504. We will deal with these arguments in turn.

[4] Taking the first submission, it is quite plain from a reading of the appellant's pleaded case that it is not a derivative action in it true sense of that term. In this context we need no more than to refer to the passage quoted by the learned judge in the court below in his judgment:

> In *Foss v Harbottle* (1843) 67 ER 189, the English Court propounded the proposition that in company law, if a wrong had been done to a company, then it was the company which was the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority did not have the locus standi to bring an action to remedy a wrong done to a company (see *Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2)* [1982] Ch 204 and *Edwards and another v Halliwell and others* [1950] 2 All ER 1064).

In *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417, Gopal Sri Ram JCA, delivering the judgment for the Court of Appeal, expressed the following views on the exception to the *Foss v Harbottle* principle:

> It is the derivative action; … It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of the decision making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

[5] The facts relied upon by the appellant do not contain anything in them that assert that the purported wrongdoers in the instant case are in control of the subject company and it is for that reason the action cannot be brought by the company. In truth the gist of the appellant's complaint is that a former director of the company allegedly committed certain breaches of her fiduciary duties for which she must now be held to account. That, in the absence of what we have already referred to as constituting the requirement of derivative action, is not sufficient to be made the subject matter of a derivate claim. We must therefore reject the first submission of the appellant and express our agreement with the way the learned judge dealt with the case before him. That brings us to the second argument.

[6] It is now well settled that a court which is moved to strike out a pleading has a separate and independent jurisdiction to direct an amendment to save the pleading in lieu of it being struck out (see *Shahidan Shafie v Atlan Holdings Bhd & Anor & other appeals* [2005] MLJU 279; [2005] 3 CLJ 793). But the power may only be exercised if the pleading is capable of being saved by an amendment. On the facts that form common ground between the litigants

before us, no amendment can possibly save the appellant's pleading because this is not a case in which the appellant is in a position to contend that the alleged wrongdoers are in control of the subject company. It is therefore purely an academic exercise to see whether the amending power ought to have been resorted to by the learned judge whose order is now under appeal.

[7] For the reasons already given, we are satisfied that the learned judge exercised his discretion conferred upon him by RHC 1980 O 18 r 19 properly. It is trite that the summary power of a court whether to strike out a pleading or enter judgment on a summons ought only to be exercised in plain and obvious cases. Suffice to say that this is a plain and obvious case. The appeal is therefore dismissed. The orders of the High Court are affirmed. The appellant must pay the costs of the appeal to the respondents. The deposit in court shall be paid out to the respondents to account of their taxed costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum